No. 12,562

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation),

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, Composed of the Territorial Insurance Commissioner, Attorney General of Alaska and the Territorial Commissioner of Labor and PETER LATHOURAKIS,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

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Under the Workmen's Compensation Act of Alaska the Alaska Industrial Board's findings, decision and award must be based upon competent evidence, and not upon ex parte, hearsay, unverified, or other incompetent evidence, whereas the Board's decision and award and its findings herein were based upon ex parte, hearsay, unverified, or other incompetent evidence and therefore were not conclusive upon the District Court 2

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The Workmen's Compensation Act of Alaska does not authorize or provide for the award for the same injury to the same employee not only of temporary, either partial or total, disability compensation but also of permanent, either partial or total, disability compensation arising by accident out of and in the course of his employment, whereas the District Court's judgment as well as the Alaska Industrial Board's decision and award allowed Lathourakis, who sustained only one injury in the same accident, total temporary disability compensation up to May 20, 1949, amounting under the judgment to $2,005.00, and 50% permanent disability compensation of $3,600.00..... 7

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Appellees.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant asks for a rehearing because it believes the Court in its opinion of August 10, 1951, notwithstanding its serious consideration for nearly 8 months of the points upon which appellant urges it is entitled to a reversal, overlooked competent, relevant evidence and either overlooked or disregarded applicable principles of law sustaining appellant's appeal.

POINT I.

UNDER THE WORKMEN'S COMPENSATION ACT OF ALASKA THE ALASKA INDUSTRIAL BOARD'S FINDINGS, DECISION AND AWARD MUST BE BASED UPON COMPETENT EVIDENCE, AND NOT UPON EX PARTE, HEARSAY, UNVERIFIED, OR OTHER INCOMPETENT EVIDENCE, WHEREAS THE BOARD'S DECISION AND AWARD AND ITS FINDINGS HEREIN WERE BASED UPON EX PARTE, HEARSAY, UNVERIFIED, OR OTHER INCOMPETENT EVIDENCE AND THEREFORE WERE NOT CONCLUSIVE UPON THE DISTRICT COURT.

Appellant did not, certainly did not intend to, qualify this point to any admission that it made no charge other than that the Board's award and the District Court's decision, as intimated by the Court's opinion, p. 2, were based in part on hearsay evidence in the form of letters from the employee's physicians.

Appellant stands squarely upon the proposition that the award and the decision were based entirely upon *ex parte,* hearsay, unverified, and other incompetent evidence, and ignored the only competent evidence by Doctors McGowan and Gray.

Appellant tried to put that contention thoroughly before the Court in its main brief (pp. 14-48).

Appellant does not deny Lathourakis testified as quoted by the Court (Op. p. 2). Nor does appellant deny that a numb hand is an objective symptom. Appellant questions that swallowing medicine, though it may be an objective act, is an objective, subjective, or other symptom of any kind.

What appellant contends is that, though Lathourakis could testify he vomited, his hand was numb, he

swallowed medicine, he was not qualified to testify what caused him to vomit, what numbed his hand, for the cure of what condition he swallowed medicine, namely: he was not an expert in human anatomy, so was not qualified to so testify and all of his testimony as to the character, extent and future effect, if any, of the internal injuries he claims to have suffered was incompetent.

Nor can appellant concede that Lathourakis' testimony was corroborated in any manner by Dr. Gray. As appellant reads the depositions of both Doctors McGowan and Gray, each specifically denied (1) Lathourakis' condition was due to any injuries he received in the accident; (2) his operation was due to the injuries he received in the accident.

To the contrary, they testified his condition was due to the operation. (McGowan's deposition, R. 52, 56-58; 51; 70; 79-80; 81; Gray's deposition, R. 86-91; 91-92; 103).

Dr. Gray said:

> Q. Doctor, did you at any time form any conclusions to the difficulty which this man was encountering with his esophagus.
>
> A. Originally I felt that a reasonable diagnosis was carcinoma of the esophagus, and therefore it was unrelated to any injury, and that is why I recommended immediate medical care, but I had to advise that the condition was unrelated to the injury, and suggested to the man that he would have to seek care of his own.
>
> At a later date I had an opportunity to review the findings that were made.

Q. Did you form any conclusion from your own examination of the man and from your review of any findings made?

A. Yes. After reviewing all of the findings in this case and reading the opinions of a pathologist who examined him, and surgeon who treated him, I came to the conclusion that this man had a pre-existing condition in his esophagus of a congenital nature, whereby he had stomach glands present in the esophagus. These stomach glands produced acid, which the linings of the esophagus is not prepared to handle, and this is an accepted cause of inflammation of the esophagus.

I came to the opinion that the trauma of the chest had apparently no direct relationship to this injury.

This opinion is not based on any great experience that I had with diseases of the esophagus. It is based upon two facts. In the first place I cannot conceive how a trauma to the chest can affect the esophagus without severely injurying or breaking down the chest wall, or causing obvious internal injuries.

Seemingly the Court ignored the Slyfield and Williams letters; but, appellant submits throughout its main brief it maintained that Lathourakis' evidence was incompetent (Bf. 17-26), and that appellant had been denied its right of cross-examination, and that the award could not be legally based upon hearsay and incompetent evidence (Bf. 27-36).

The governing rule was announced by the United States Supreme Court, viz.:

But the more liberal the practice in admitting testimony, the more imperative the obligation to pre-

> serve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.
>
> *Interstate Commerce Com. v. Louisville & N.R. Co.,* 227 US 88, 93, 57 L.ed. 431, 434,

which rule was reaffirmed in

Bridges v. Wixon, 326 US 135, 89 L.ed. 2103.

This rule applies in Alaska, whose legislature has no authority to deprive appellant of due process of law or of the equal protection of the laws, which deprivation necessarily results by violation of the rule.

The Board has no authority to violate this rule announced by the U. S. Supreme Court, and the Board's rule 13, in admitting hearsay or other incompetent evidence, necessarily is illegal.

Alaska's legislature is a legislative, not an administrative, body; hence, necessarily the Federal Administrative Procedure Act doesn't apply to it; but, such fact is entirely immaterial, because the legislature's acts are subject to the Constitution of the United States.

Rules, such as the Board's Rule 13, and the administration of them as the Board did in its award in

this and the companion *Landro* case, undoubtedly lead to the enactment of the Administrative Procedure Act in Congress' attempt to prevent Federal administrative bodies, similar to the Alaska Industrial Board, from depriving persons of their constitutional rights.

Appellant is cognizant of the theoretical rule advocated by Wigmore. But, fortunately, even as admitted by Wigmore (Volume 1, p. 83, 3rd ed.), the majority of the courts refuse to recognize a theory that, if practiced, would deprive litigants of the American principles of justice by which their constitutional rights are protected against the threat of hearsay, with its lack of cross-examination to establish the truth and to destroy rumor, gossip, and falsehood.

It is of grave moment if the Court lays down or even intimates that in its circuit a litigant cannot claim and rely upon the right of cross-examination; but, seemingly if this Court in either this or the companion *Landro* case, upholds its present opinion, at least by implication it thereby announces that that right does not exist in hearings before the Alaska Industrial Board.

Appellant predicts that such announcement would eventually lead to rumors, newspaper articles, and unsworn hearsay of all kinds becoming admissible even in the courts.

Appellant is unable to see any evidence, other than the *ex parte,* unverified Slyfield and Williams letters, that Lathourakis' condition became fixed on May 20, 1949.

Appellant urges that the only injury proved by competent evidence was the temporary discoloration, swelling, and bruising of Lathourakis' left forearm, and that he entirely recovered from that injury by October 1, 1948, and was paid in full all the compensation he was entitled to therefor.

POINT II.

THE WORKMEN'S COMPENSATION ACT OF ALASKA DOES NOT AUTHORIZE OR PROVIDE FOR THE AWARD FOR THE SAME INJURY TO THE SAME EMPLOYEE NOT ONLY OF TEMPORARY, EITHER PARTIAL OR TOTAL, DISABILITY COMPENSATION BUT ALSO OF PERMANENT, EITHER PARTIAL OR TOTAL, DISABILITY COMPENSATION ARISING BY ACCIDENT OUT OF AND IN THE COURSE OF HIS EMPLOYMENT, WHEREAS THE DISTRICT COURT'S JUDGMENT AS WELL AS THE ALASKA INDUSTRIAL BOARD'S DECISION AND AWARD ALLOWED LATHOURAKIS, WHO SUSTAINED ONLY ONE INJURY IN THE SAME ACCIDENT, TOTAL TEMPORARY DISABILITY COMPENSATION UP TO MAY 20, 1949, AMOUNTING UNDER THE JUDGMENT TO $2,005.00, AND 50% PERMANENT DISABILITY COMPENSATION OF $3,600.00.

Appellant's contention is broader than "that the act does not permit recovery for both temporary and permanent disability," but includes the condition "arising out of the same injury in the same accident."

Appellant tried to thoroughly analyze the statute in its main brief. (Bf. 48-67).

Appellant submits the Court has overlooked the important, new, legislative language in present Section 1 of the Act (Bf. 52) and the important legislative language removed from Section 1 of the former 1915, 1923, 1927, and 1929 Acts (Bf. p. 52).

Language inserted: "or due him" and "in addition to."

Language removed: "and the employee has been paid compensation for temporary disability" and "deducted from."

To mean, what the Court holds, all the legislature need have done was to substitute "in addition to" for "deducted from," because the Section would then have read:

> "And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, and the employee has been paid compensation for temporary disability, the amount so paid him shall be in addition to the amount to which he shall be entitled under such provisions in this schedule."

Liberality of construction does not justify the conclusion that the legislature intended to provide by the 1946 act that compensation paid for temporary disability should be retained by the employee even though he later became entitled to compensation for, example, the loss of an arm.

If so, the legislature acted senselessly in its elimination of the clause, "and the employee has been paid compensation for temporary disability."

Nor is appellant's a harsh construction. No person can lose a hand, a foot, an arm, or a leg without suffering some temporary disability. Under the Court's

construction, in every instance he will be entitled to be paid temporary disability compensation plus the fixed compensation for the lost member. Appellant submits that there is only one injury, the lost member.

Appellant has never contended that under the Act should an employee be paid disability compensation, either temporary or permanent, but later die because of the same injury that his beneficiary would not be entitled to the compensation allowed for his death. Then two different claimants are involved, each entitled to their compensation, and payment of one could not be credited against the other.

Appellant is unable to see, even though Workmen's Compensation Acts are to be liberally construed, the applicability of *B. & P. Steamboat Co. v. Norton,* 284 U.S. 408, 414, or how Title 33 USCA 908, in view of its language could have been construed otherwise than it was by the U. S. Supreme Court.

But, the language of that Statute is not the language of the Alaska Act, nor is there any similarity.

Nor will any harsh or incongruous result occur by upholding appellant's contention. Nothing will result other than to make effective the plain intent of the legislature as expressed in Section 1 of the Act. Lathourakis will be paid all the compensation he is entitled to under the Act.

Furthermore, the Congress seemingly thought the construction was strict, not liberal. See: U.S. Code Congressional Service, 80th Congress, Second Session, 1948, Volume 2, page 2.

Moreover, the Longshoremen's Act now and then had specific limitations on amounts of compensation payable. See: Title 33 USCA 914(m).

In *Contractors v. Pillsbury,* 150 F. 2d 310, seemingly the question of the competency of the evidence was not involved. This Court specifically said (ib., 312): "There was evidence covering material facts before the Deputy Commissioner which will support the award."

Appellant submits there was no competent, material evidence to support the Board's award here.

The Court also upheld the now familiar rule of liberal construction of Workmen's Compensation Laws.

Thoresen v. Schmahl, 24 NW 2d 237, and *Wilkins v. Blanchard-McDonald Lumber Co.,* 52 A. 2d 781, each reiterate that rule.

Appellant doesn't challenge that rule or its propriety; but, contends it doesn't override plain legislative language or recognized rules of statutory construction.

If the Court's present opinion stands, the serious result will follow that no limitation whatever exists in Alaska upon the payment of temporary disability compensation, and no matter how much is paid or for how long a period, should eventually the injury become permanent, either total or partial, compensation must be paid therefor in addition to that already paid for temporary disability compensation.

POINT III.

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ALLOW AND ASSESS AN ATTORNEY'S FEE OF $350.00, OR ANY SUM, TO LATHOURAKIS FOR SERVICES OF HIS ATTORNEY IN THE PROCEEDINGS BEFORE THAT COURT.

Appellant submits that this Court's opinion disregards the fact that when Section 43-3-17, ACL 1949, reading:

> "In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court."

was enacted on April 1, 1946 (Ch. 9, ASL 1946,—Appendix A, Appellant's Brief), attorney's fees were not allowed as costs in ordinary civil actions under Chapter 58, ASL 1937, which was then in effect.

Chapter 84, ASL 1947, now Section 55-11-55, ACLA 1949, was not enacted until March 27, 1947.

But, the allowance of costs under Section 55-11-55 is controlled by Section 55-11-52, ACLA 1949, and this proceedings is not within the purview of the latter section.

Appellant submits that it is unthinkable the Territorial Legislature, without plain words, would enact a law requiring an injured employee to pay his employer's attorney fee should an appeal from the Board's award to the District Court result favorably to the employer, yet surely, if an unsuccessful employer may be forced to pay it, so in justice and fair play should the employee, if he loses in the District Court.

Wherefore appellant prays that it may be granted a rehearing, but should it be denied that a further stay of 30 days may be granted.

Dated, Juneau, Alaska,
September 7, 1951.

Respectfully,
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Robert V. Holland,
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Attorneys for Appellant.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay; and that all three points are meritorious, and the first two are of grave import to the welfare of Alaska and to the administration of justice therein.

Dated, Juneau, Alaska,
September 7, 1951.

R. E. Robertson,
Of Attorneys for Appellant.